Supreme Court, U.S.
FILED
MAR 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1326

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

VICTOR R. DYDYN,
Petitioner,

v.

DEPARTMENT OF LIQUOR CONTROL,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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Brescia's Printing Services, Inc.
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QUESTIONS PRESENTED

In a State administrative appeal challenging the validity of a state liquor control regulation banning nude conduct at a permit premises:

1. Did the State court err in concluding that the Twenty-first Amendment to the United States Constitution confers authority on the States to regulate liquor, even against the free speech clauses of the Connecticut Constitution?

2. Did the State court err in giving full recognition and effect to the Twenty-first Amendment pursuant to the Supremacy Clause of the United States Constitution, even against the free speech clauses of the Connecticut Constitution?

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STATEMENT OF THE CASE

The Respondent, Department of Liquor Control, accepts the statement of the case presented by Petitioner, excluding legal arguments contained therein and except to note that the Petitioner's permit premises was ordered suspended for 35 days for violation of the regulation, not 45 days. Additionally, Respondent agrees that Connecticut never expressly adopted, as part of its state constitution, a provision similar to the Twenty-first Amendment. Petitioner's Brief p. 6. However the Twenty-first Amendment to the United States Constitution was ratified by Connecticut on July 11, 1933. Res., 73d Congress, 2d Sess., 78 Cong. Rec. 38-40 (1934).

REASONS FOR DENIAL OF THE PETITION

1. The case below essentially was decided on state law grounds.

It is beyond any reasonable doubt that, against federal free speech challenges, a state can ban topless dancing and other nude conduct, regardless of whether it is obscene, as part of its liquor licensing program pursuant to the Twenty-first Amendment of the United States Constitution. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) *(Bellanca I); Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972). *See also State v. Baysinger*, 397 N.E. 2d 580 (Ind. 1979), *appeal dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980). Recognizing this obstacle in the case below, Petitioner, *inter alia*, challenged Connecticut's liquor control regulation proscribing nude conduct at permit premises as violative of the free speech provisions of the Connecticut Constitution. This state constitutional issue is clearly a matter of state law, and so is the Twenty-first Amendment issue. Assuming that the Twenty-first Amendment confers powers on the states, it is within the prerogative of the states whether to exercise that power. Connecticut exercises that power as a matter of state law. Thus, the resulting decision essentially is a matter resting on independent and adequate state law grounds beyond review by a Writ of Certiorari, and the petition should be denied accordingly.

2. The case below raises no significant issues of federal law concerning the Twenty-first Amendment.

In an effort to articulate some substantial federal issues in this case within the jurisdiction of this Court, Plaintiff argues that the Connecticut court erred in stating that the Twenty-first Amendment grants additional police power to the states to regulate liquor. Rather, he argues, the Amendment ". . . merely repeals federal First Amendment limitations . . ." and "[i]ts only effect, therefore, is to restore to the

states their original, inherent, plenary police power . . ." which is subject to state constitutional guarantees. Petitioner's Brief, p. 4.

The argument is 55 years too late. Virtually since its enactment, the Twenty-first Amendment has been interpreted by this Court as conferring on the states "more than the normal state authority over public health, welfare and morals." *California v. LaRue*, 409 U.S. at 114. The states may delegate this broad power as they see fit. *City of Newport, KY. v. Iacobucci*, 107 S.Ct. 383, 385 (1986). Also, while earlier decisions of the Court often and forcefully shielded state liquor policy from federal oversight, *see, e.g., State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 64 (1936), modern case law makes it crystal clear that the Twenty-first Amendment does not repeal other federal constitutional provisions. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The state court decision below is in harmony with modern Twenty-first Amendment case law on both points. The impact of Connecticut constitutional provisions on this authority is a state-law question.

3. The Supremacy Clause of the United States Constitution was not misused to bar potential expansion of state constitutional rights.

The lower court correctly decided that Connecticut's Twenty-first Amendment authority does not reach a wall once state constitutional challenges are raised. The Supremacy Clause, cited by the court on this point, dictates this result by its plain words:

> This Constitution . . . shall be the Supreme Law of the Land; and the Judge in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.
>
> U.S. Const. art. VI cl. 2

The applicability of the Twenty-first Amendment did not foreclose the lower court from considering Petitioner's state constitutional arguments. However, the lower court found Petitioner's state free speech rights to be co-extensive with the First Amendment and found "no reason or authority for the proposition that the state freedom of speech provisions should be read more broadly than their federal counterparts" in this case. *Dydyn v. Dept. of Liquor Control*, 12 Conn. App. 455, 463, 531 A.2d 170 (1987); Petitioner's Brief, App. A, p. A-9. Nor did the lower court find significance in the fact that there was no enactment similar to the Twenty-first Amendment in Connecticut's Constitution. *Id.* at 461; Petitioner's Brief, App. A, p. A-7. Consequently, the result in this case follows the result in cases where similar regulations were upheld against federal First Amendment challenges. While other states protect naked dancing at liquor permit premises under their state constitutions; *see Mikens v. City of Kodiac*, 640 P.2d 818 (Alaska 1982); *Bellanca v. New York State Liquor Authority*, 54 N.Y. 2d 288, 429 N.E. 2d 765, 45 N.Y.S. 2d 87 (1981), *cert. denied* 456 U.S. 1006 (1982) *(Bellanca II); Commonwealth v. Sees*, 374 Mass. 352, 373 N.E. 2d 1151 (1978); Connecticut joins the states that do not. *See City of Daytona Beach v. Del Percio*, 476 So. 2d 197 (Fla. 1985); *Nall v. Bacca*, 95 N.M. 783, 626 P.2d 1280 (1980). Petitioner's argument suggesting the misapplication of the Supremacy Clause is so devoid of merit that it should not be considered as raising a substantial federal question.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted.

DEPARTMENT OF LIQUOR CONTROL

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